NO. 20145

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN MARSHALL,

Appellant,

vs.

GRANT SAWYER, et al.,

Appellees.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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Los Angeles, California 90014

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The District Court had jurisdiction under 28 U.S.C. 1332 (a) (1) [diversity of citizenship] and under the Federal Civil Rights Act (28 U.S.C. 1343 [3] and 42 U.S.C. 1983), this being an action for damages and for an injunction arising out of the action of the defendants in ousting plaintiff from, and preventing him from being on, any portion -- including the restaurant, sleeping accommodations, golf course, drugstore, swimming pool, etc. -- of any premise in the State of Nevada which also has on it a

portion licensed for gaming (Appx. B). 1/

This is an appeal from the judgment denying relief entered on April 1, 1965 (CT 190). Notice of Appeal was filed on April 26, 1965 (CT 204).

This Court has jurisdiction of the appeal under 28 U.S.C. 1291, 1294(1) and 2107.

STATEMENT OF THE CASE

Facts

The facts are essentially not in dispute.

At the end of 1959, the state defendants 2/ were not pleased

1/ This is the second time this case is before this Court, the previous appeal (No. 17322) having resulted in a reversal of the trial court's dismissal of the case on the ground of abstention (301 F. 2d 639). The record certified to this Court on this appeal consists of the Clerk's Transcript (CT) of all the proceedings in the trial court upon the remand, the Reporter's Transcript (RT) of the trial of the action on the remand and the Exhibits introduced and sought to be introduced at the trial. In accordance with Rule 18 (2) (f) of this Court, the list of exhibits is set out as Appendix A hereto. The Complaint and the Answer of the non-state defendants were not re-certified to this Court. They are present in the record on the previous appeal in No. 17322, pp. 1-13 and 26-26a, respectively. For the convenience of the Court and counsel, the complaint and said answer are reprinted as Appendix B and Appendix C, respectively, hereto.

2/ Unless otherwise noted,"defendants" in this memorandum refers to the State appellees, Grant Sawyer, Governor of Nevada, the Nevada Gaming Control Board and Gaming Control Commission and the respective members thereof. When the non-state defendants are referred to, they will be so noted, i.e., as the non-state defendants, they being the D. I. Operating Co., doing business and operating the Desert Inn Hotel in Las Vegas, Nevada and employees thereof (Appx. B).

(RT 38) that certain magazine articles, such as Exhibit 2 in evidence, 3/ stated that some of the persons who actually held gambling licenses in Nevada were "characters in the underworld or on the fringes of it. Graduates of the lawless prohibition days, many with criminal records," (Exh. 2, p. 139) "hoodlums," (ibid, p. 142) "the list of licensees . . . reads like a page out of a U. S. Senate investigation into the Cleveland underworld." (ibid, p. 143) "one time bootlegger and gambling figure," (ibid) "served a three-year term for tax evasion," (ibid) "ex-bootlegger and gambler" (ibid) "closely associated with an important member of the Capone gang." (ibid) To combat these statements as concerning actual licensees, 4/ "to protect the good name of the legal gambling industry in the State of Nevada and, of course, the State of Nevada itself," (RT 33) defendants (RT 33) hit upon the idea of picking out 11 men, putting their names, pictures, descriptions, FBI and C11 or KCPD number in a "black-book" (Exh. 1) and on March 29, 1960, advising the owners of the 12 major Las Vegas strip hotels and the Hotel Fremont in downtown Las Vegas (and later the other major

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3/ Characterized as to some parts of which by defendants as "exaggeration" (RT 476) or "inaccurate" (RT 128) or, as to the statement that $3 billion is gambled yearly in Nevada, as "nonsense" (RT 133).

4/ That licensees do have extensive police records (RT 59), are considered by defendants to have unsavory reputations such as defendants attribute to plaintiff (RT 66), "have a reputation of being a rum-runner in prohibition or a gambling racketeer or something like that" (RT 129), had a tax evasion conviction (RT 132) "some had a reputation of being connected with mobs" (RT 477) is conceded by defendants (references op. cit. this f. n. and RT 462, 479).

clubs in the Lake Tahoe-Reno area [RT 44, 45]) that the presence of these men in their establishment was to be prevented "in order to avoid the possibility of license revocation." (Exh. 3, RT 50). 5/

The book was compiled without "independent investigation of these people." (RT 36). Specifically, with regard to data received from the Chicago Crime Commission concerning plaintiff, defendants did not investigate and did not know whether the statements made therein were true (RT 37) or the sources reliable (ibid). The Chairman of the Gaming Commission, though he participated in the creation of the black book (RT 456) had no idea why plaintiff was included in it (RT 461).

The hotels, on the "premises" of which defendants decreed plaintiff may not be (RT 179), are large establishments, each of them covering many acres, all of them serving the public, including children, in the manner hotels in cities and resort areas normally do, and offering the usual non-gambling facilities such hotels do. See, generally, plaintiff's Exhibits 6A through 6H. The Desert Inn (Exh. 6B), for example, is typical. It has hotel rooms

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5/ Two of the defendants offered other reasons, without stating facts, for the compilation of the black-book and the orders of exclusion, such as "attempts of outside influences to infiltrate into the gaming industry" (RT 453, 458), "visitations of people who had reputations of being connected with organized crime mobs in various cities in the United States" (RT 471), this leading to a concern as to the "public image" (RT 472) that these persons "might be in some way organizing similar activities that they are accused of back wherever they came from" (RT 473), but it became clear on cross-examination that defendants had, and did, exercise, ample authority in the granting and refusal of licenses and had no problems concerning hidden interests (RT 460), that the real concern was publicity (RT 465, 475).

(RT 167), lobby (ibid), coffee shop (ibid), show room (ibid), lounges (ibid), swimming pool (ibid), golf course (ibid), concession stands (ibid), ladies' dress shop (ibid), men's shop (ibid), beauty shop (ibid), drug store (ibid), novelty shop (ibid), barber shop (ibid), upstairs room for dancing (ibid), a health club (RT 171). To go to such places as the swimming pool, the cigar stand, to register at the hotel, the health club, it is not necessary to go through the gambling casino (RT 168, 171). The shopping arcade is outside the main building (RT 167). The hotel holds golf tournaments that attract large numbers of people (RT 168). 6/ Rooms are rented to families with children (RT 168). Children are permitted anywhere on the hotel premises, including the shows, except the gaming casino, the slot machines and the bar (RT 169). Convention facilities are available (e.g., Exh. 6A).

The hotels are centers of public gatherings to which the public is invited for many purposes. See, generally Exhibits 7A through 7I. For example, the Desert Inn presents the "Tournament of Champions" (Exh. 6B) and the "Challenge Golf Series". A story in the Las Vegas Review Journal for September 18, 1963 (Exh. 7A, p. 24, cols. 1, 2, 3) announced:

> "The public is invited free to attend all three scheduled contests and tee off time has been set for 8 a.m."

The Chamanettes, a women's organization, had its convention at

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6/ Plaintiff plays golf (RT 203).

the Sahara Hotel (Exh. 7B, p. 14, cols. 4, 5).

The Thunderbird Hotel was the place selected for a press conference to announce plans for a "Disneyland" Fund Park in Las Vegas (Exh. 7C, p. 9, cols. 2-6).

The National Conference of Christians and Jews held its annual meeting banquet at the Virginia City Room of the Thunderbird Hotel on September 26, 1963. The public was invited. The Hon. Howard W. Cannon, United States Senator gave the address (Exh. 7D, p. 7, col. 102; p. 20, cols. 7-8).

The Las Vegas Chapter of the American Institute of Banking met in the International Room of the Stardust Hotel on September 7, 1963 (Exh. 7F, p. 12, col. 3). The National Society of Public Accountants held a meeting at the Flamingo Hotel during the week of August 22, 1963 (Exh. 7G, p. 8, col. 5). And the Saints and Sinners, well known organization to assist charities involving children, held its organizing meeting in the Thunderbird Hotel's Virginia City Room on August 25, 1963 (Exh. 7H, p. 5, col. 3).

Mortimer Caplin, United States Commissioner of Internal Revenue, gave a talk sponsored by the Las Vegas Men's Club, which was open to the public, at a dinner banquet at the Thunderbird Hotel on August 21, 1963.

And, of course, the various shows given by the hotels advertise and invite the public to attend (Exh. 7D, p. 9, col. 4; p. 10, col. 8,; p. 28; Exh. 7E, p. 2, cols. 5-8; p. 5, cols. 1, 2; p. 7, cols. 3-4, 7-8; p. 9, cols. 7-8; p. 11, cols. 2, 8; p. 14, cols. 3-6).

Despite all this public, non-gambling, activity that goes on, defendants, speaking as and for the State of Nevada, insist that plaintiff cannot step foot, not one inch, on the property. This includes going to the coffee shop (RT 72), the swimming pool (ibid), registering at the hotel (ibid), going to the golf course (ibid), seeing a show (ibid). The asserted prohibition ordained by defendants also includes plaintiff's not having lunch or dinner at one of the hotels with his attorneys while he was litigating this case before the trial court (Cf. RT 242-244).

Plaintiff had lived in Las Vegas for about four years during the 1950's (RT 194). He engaged in business there (ibid), bought land there (RT 196) and still owns some of it (ibid). He has had occasion to return to Las Vegas on business on numerous occasions (RT 196), some of which were concerned with litigation over the property, including the taking of depositions (RT 213-214).

In October of 1960, plaintiff had to come to Las Vegas on business and he registered at the Tropicana Hotel (RT 198). While there, representatives of the hotel came to him, told him he was in the black-book, asked him to leave and told him that if he did not, they would lose their license (RT 199). On another occasion, while at the Tropicana, his services were curtailed, and so for that reason he left (RT 200). 7/

7/ This curtailment of services was in accordance with a suggestion made by defendants when they were handing out the black book and letter (RT 48, 49, 79) together "with an implied threat of formal action" as to suspension or revocation of license should the licensees "fail to make proper efforts to comply with the state's request for cooperation" (RT 50).

That week, wherever plaintiff went, he was asked to leave because of the pressure from defendants (RT 200, 201, 202, 204, 206, 78). In consultation with the defendant Governor, defendant Keefer and defendant Turner, it was decided that, for the first time in this manner (RT 161), defendants "would institute an examination of dice and cards to include the hotels, or most of them, that had been catering to" plaintiff (RT 81-82). This, so that the hotels "will get the message" (RT 84). This was done with a battery of 18 or 20 Gaming Board agents going into the pits to make this "routine examination of their dice and cards" (RT 85). This was done twice during that week (RT 86) and in addition, on the second occasion, the dealers and pit bosses were asked to show their work cards (RT 87). This "checking" was done at the Desert Inn, the agents coming in "like gangbusters" (RT 181), or, as described by the Attorney General of the State of Nevada, by the use of "muscle" (RT 445), was detrimental and did not look good to the customers (RT 160), but the non-state defendants "got the message".

The next night, October 28, 1963, plaintiff came in to the Desert Inn, sat in a booth in the lounge where there is no gambling of any kind (RT 162). Because they feared loss of their licenses, and the presence of defendants' agents (RT 189, 206, 210), the non-state defendants, Roen and Kolod, and their employees Borax and Murray required plaintiff to leave (RT 163, 164, 165, 183, 189, 207) which he did, under protest and against his will (RT 164, 207, 208). All this was done in public, in the presence of large numbers of persons (RT 165, plaintiff's Exh. 4 and 5); the foyer was

crowded, the show just having ended, people were going in and out in droves (RT 92).

Although none of the non-state defendants actually physically put his hand on plaintiff, it is perfectly clear from the situation that had plaintiff not taken the peaceful way out, the presence and participation of the security officers (RT 187, 189) posed an ever present physical threat.

At no time was any of plaintiff's conduct objectionable to either the non-state (RT 166, 173, 183, 185, 191, 192) or the state (RT 98, 118, 121) defendants. He was not boisterous, had created no disturbance and had conducted and behaved himself properly at all times (ibid). Indeed, the defendants are not concerned with plaintiff's conduct at all (RT 121).

Following his ejection from the Desert Inn, plaintiff went to the Sahara Hotel where he met some friends at the bar (RT 211), started to have a drink with them and was again told to leave because the Gaming Control men were there and plaintiff was in the black-book (RT 211-212).

At a later date plaintiff was required to be back in Las Vegas to give a deposition in connection with the litigation of his property (RT 213-214), was in his room at the Dunes Hotel late at night (RT 118, 212) when a representative of the hotel came to his room, knocked on the door and told him to leave because otherwise, they, the hotel, would lose their license (RT 213). Picturesquely, Mr. Weiman of the Dunes Hotel, said (RT 213): "Be my guest somewhere else, but please get out of here."

that that would be all right (ibid).

But it was not all right with the defendants. During the very performance, so insistent were the Gaming Control Board members, that Mr. Sims was compelled to go over to plaintiff, in the theatre, and ask him to leave (ibid). When plaintiff told Mr. Sims that he was going to watch the show and then leave, Mr. Sims advised that Mr. Lippold, the Gaming Control Board member, was sitting right there watching them, and was going to watch Sims escort plaintiff to the door, which he did (RT 216). The Gaming Control Board members, including the Chairman, knew that plaintiff was with his wife and niece (RT 121) and here, again, no complaint of any impropriety on the part of Marshall was made (ibid).

QUESTION INVOLVED

May a state, consistent with the due process, equal protection and privileges and immunities guarantees of the Fourteenth Amendment to the United States Constitution and with the Bill of Attainder Clause (Art. I, §10, cl. 1) of the Constitution, without any showing of necessity therefor and without any showing that less drastic, more precise methods would not combat the supposed evil sought to be reached, completely, and by name, ban a United States citizen from the entire premises of a business establishment with many accommodations open to the public, only one portion of which is licensed for gaming, on the ground that said person is a person of notorious or unsavory reputation?

SPECIFICATION OF ERRORS

1. The Trial Court erred in giving judgment to the defendants and in failing to give judgment to the plaintiff.

2. The Trial Court erred in finding (CT 187, Par. L) that "plaintiff suffered no pecuniary damage whatever by reason of his inability to remain in any hotel, bar or restaurant where there was no (sic) licensed gaming in the State of Nevada."

This is obviously a typographical error. The finding was undoubtedly meant to read "where there was licensed gaming, etc.". So read, the finding is not supported by the evidence, for the evidence is clear that plaintiff was ousted from and is not permitted to be at any part of such establishment in the State of Nevada. Accordingly, he has suffered and is suffering pecuniary damage.

3. The Trial Court erred in finding that

a. (CT 188, Par. LIV) "The state defendants acted reasonably in their classification of plaintiff as an undesirable person who should be excluded from gaming establishments in the State of Nevada", and

b. (CT 188, Par. LV) "The action of the state defendants in causing and coercing the non-state defendants to exclude plaintiff from the entire premises wherein gaming was permitted and licensed pursuant to the laws of the State of Nevada, and not merely from the gaming area of such premises, was necessary in order to achieve effective enforcement of the Nevada

Gaming Control Act and of the regulations of the Nevada Gaming Commission and the State Gaming Control Board."

By the words "gaming establishment" in Finding LIV, appellant understands the meaning to be: from any portion of the premises on which there is licensed gaming, as distinguished from the portion where licensed gaming is going on. For that is what this case is all about, as Finding LV at least recognizes. Appellant is not here contesting for the right to gamble nor for the right even to be in the gaming area. So understood, there is no evidence in the record of this case which will support a finding of reasonableness on the part of the defendants nor any showing of necessity to achieve effective enforcement of the Nevada Gaming Control Act nor of the regulations of the Nevada Gaming Commission or State Gaming Control Board. On the contrary, the evidence shows arbitrariness on the part of defendants and, what is perhaps more important, violation by defendants of plaintiff's constitutional rights. Violation of constitutional rights cannot be said to be reasonable nor must it give way to administrative expediency.

4. The Trial Court erred in all of its conclusions of law (CT 188-189).

This is, of course, but another way of saying, as in Specification of Error Number 1, supra, that the Court erred in giving judgment for defendants. That is to say, the classification of plaintiff to be excluded from the entire premises was an unreasonable and invalid exercise of the police power (Conclusion I, CT 188), the preparation and circulation of the "Black Book"

without notice or opportunity to be heard did deny due process, indeed, it was also a Bill of Attainder (Conclusion II, CT 188), the state defendants are liable to plaintiff for preparing and circulating the "Black Book" and in connection with the classification of plaintiff as an undesirable person to be excluded from the entire premises on one part of which gaming is licensed (Conclusion III, CT 189), both the state and non-state defendants are liable to plaintiff for refusing service in, and in excluding plaintiff from, the premises of the Desert Inn Hotel (Conclusion IV, CT 189). Plaintiff was deprived of rights, privileges and immunities secured to him by the Constitution by the actions of the state and non-state defendants (Conclusion V, CT 189), plaintiff was subject to an unreasonable search and seizure and deprived of rights guaranteed him by the Fourth Amendment to the Constitution (Conclusion VI, CT 189) and plaintiff was damaged by reason of the facts alleged in the complaint and proved at trial (Conclusion VII, CT 189).

ARGUMENT

Summary of Argument

In his argument, plaintiff points out that this is not a gambling case, that defendants by their conduct have excluded and continue to exclude plaintiff from places of public accommodation not because of any misconduct of plaintiff, but solely because of plaintiff's alleged notorious and unsavory reputation by reason of which defendants consider plaintiff to be an undesirable person to be served and

treated as others are. Plaintiff urges that this is a violation of his rights of due process of law and to the equal protection of the laws.

He urges that if he is or has been guilty of violation of law, he may be charged and tried therefor -- that due process requires no less -- but that for the State to decree where a citizen may obtain the ordinary necessities of life, such as where he may eat and where he may sleep, is beyond the power of the State, and that in any event defendants' conduct is unconstitutional on the ground of overbroadness; that when personal liberty is being curtailed by the State, precision is the touchstone of permissible action and that here defendants have gone far beyond any necessity. Plaintiff argues that the right to freedom of movement is a privilege and immunity of a citizen of the United States, and includes the right of access to places of public accommodation which cannot be impaired by the State, at least without evidence of abuse by the citizen of that privilege.

Plaintiff points out that he is not seeking a license from the State to conduct gambling, nor to gamble nor even to be at a place where gambling is conducted; that simply because gambling is conducted at other parts of the public premises is no justification for defendants' arbitrary conduct.

Plaintiff contends that this Court's opinion when this case was previously here on appeal (#17322; 301 F. 2d 639) supports him in his claim and that the proof which in the eyes of even the concurring justice would sustain defendants' conduct (301 F. 2d at 647-654) was not adduced by the defendants.

Plaintiff further argues that the listing by the State of plaintiff in a "black-book" as an undesirable without notice or hearing violates fundamental due process and also is, or is akin to, a Bill of Attainder.

He urges that the freedom from unreasonable search and seizure guarantee of the Fourth Amendment includes the right to be let alone by State authority unless the individual is engaged in misconduct, which defendants themselves concede he was not.

Finally, plaintiff urges that he was entitled to damages for, and injunction against, defendants' conduct and that the trial court's judgment in denying all relief to him should be reversed.

It is often helpful in the decision of a matter to have clearly in mind what is not involved. The instant case is no exception.

This is not a gambling case.

The case is not concerned with the right to gamble, nor with the right to be a licensee and operate a gambling establishment nor even with the right to be present at a gambling device; it just does not concern gambling at all. Whatever may be the right of defendants to say who shall and who shall not have licenses to conduct gambling in the State, or their right, if any, to determine who among the citizenry may be permitted to gamble, or the right, if any, to say who among the populace may be permitted to be at a gambling device though not participating in gambling, have nothing to do with this case.

Indeed, even aside from the fact that the evidence adduced at the trial was not concerned with gambling, the very instructions issued by defendants, both written and oral, made clear that gambling was not involved and that not even defendants considered it to be. For example, the March 29, 1960 letter of instruction (Exh. 3) states:

> "These individuals are known to visit the Las Vegas area on occasion and usually obtain accommodations at various strip establishments.
>
> "In order to avoid the possibility of license revocation for 'unsuitable manner of operation', your

immediate cooperation is requested in preventing the presence in any licensed establishment. . . . " (emphasis added).

We repeat: the case does not involve gambling. What it does involve is the right to be let alone, "the most comprehensive of rights and the right most valued by civilized men." (Mr. Justice Brandeis, dissenting, in Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. ed. 94). It involves the simple right just to be and to live -- including the obtaining of the basic human needs of food, to rest at night when one is in town to give one's deposition in a court case, to go, if necessary to the men's room, or, yes, if you will, to take one's wife and niece to a show when they are on vacation, or to play golf or view a tournament.

While, from their conduct, it appears that defendants regard lightly the dignity of the individual and the right to be treated as a human being, this Court is not so callous. Cf. its decision in York v. Story, 324 F. 2d 450 (CA 9 1963 - pet. for writ of cert. den. 376 U.S. 939, 84 S. Ct. 794, 11 L. ed. 2d 659); and see Cohen v. Morris, 300 F. 2d 24 (CA 9 1962).

It is interesting to note that as to licensees, over whom defendants do have some control, defendants are of the view that they "cannot act arbitrarily or capriciously," (RT 131) and that the licensees must be given "a day in court, so to speak." (RT 454). But defendants have no such reservations as to the citizenry over whom "neither the Commission nor the Board has any jurisdiction."

(RT 46).

Defendants concede (RT 345, 349, 350) that the defendant, Governor Sawyer, did publicly state as to the events described in the factual statement above, and presumably meant it when he said it (Exh. 8):

> " . . .
>
> " 'I agree with any measures necessary to keep the hoodlums out of Nevada.' . . . 'The operators have a responsibility to cooperate.'
>
> " . . .
>
> " 'We might as well serve notice on underworld characters right now they are not welcome in Nevada and we aren't going to have them here.' . . . "

It is true that defendants now concede (RT 21, 71) they have no right to keep plaintiff out of the State entirely. But they stoutly insist that they have the right to keep him out of parts of the State -- parts which are open for public accommodation and parts which have nothing to do with gambling. The purported distinction is without a difference.

I

WHEN A STATE OUSTS A CITIZEN, OR CAUSES HIM TO BE OUSTED, FROM A PRIVATELY OWNED BUSINESS WHICH IS OPEN TO THE PUBLIC, WHEN THAT CITIZEN IS CONDUCTING HIMSELF PEACEFULLY AND PROPERLY, THE STATE VIOLATES DUE PROCESS AND DENIES EQUAL PROTECTION OF THE LAWS.

It will perhaps help to set this case in proper perspective to consider that the issues in the case are the same as though this were a criminal prosecution against Mr. Marshall for trespass. That is, had plaintiff here not left the premises, but continued to sit in the Desert Inn lounge requesting service and not getting it. What then? If defendants have the authority they assert and the plaintiff having refused to leave private property when asked to do so, as here, then presumably plaintiff would be guilty of trespass or, as is sometimes charged, disturbing the peace, disorderly conduct or like crimes, and could be arrested and prosecuted therefor. But could he, legally? Recent Supreme Court decisions in some "sit-in" cases give the answer, and the answer is "no".

In Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L. ed. 2d 207, the defendants, Negroes, were convicted in the Louisiana state courts of disturbance of the peace when they sat quietly at lunch counters, requested service and refused to move when told that the counters where they were to be served were across the hall and for them to move there where they would be served. Louisiana statutes required the separation of the races

in the service of food in public places. The United States Supreme Court reversed the convictions, holding that there was no evidence to support a finding of disturbance of the peace, therefore the convictions violated due process of law. Cf. Boynton v. Virginia, 364 U.S. 454, 81 S. Ct. 182, 5 L. ed. 2d 206, reversal of conviction for remaining without authority of law upon premises after having been forbidden to do so.

In Peterson v. City of Greenville, 373 U.S. 244, 83 S. Ct. 1119, 10 L. ed. 2d 323, the State convictions were for trespass when Negroes refused to leave a lunch counter after the owner told them the counter was closed and requested everyone to leave. The ordinance here, too, required the operator of the premises not to serve the races in the same room. Here again the Supreme Court reversed by reason of the Fourteenth Amendment. To the same effect: Gober v. City of Birmingham, 373 U.S. 374, 83 S. Ct. 1311, 10 L. ed. 2d 419 and Avent v. North Carolina, 373 U.S. 375, 83 S. Ct. 1311, 10 L. ed. 2d 420.

In Lombard v. Louisiana, 373 U.S. 267, 83 S. Ct. 1122, 10 L. ed. 2d 338, the petitioners were both White and Negro. They were convicted in the State courts for violation of the Criminal Mischief Statute which makes it a crime to refuse to leave a place of business after being ordered to do so by the person in charge of the premises. There was no statute nor ordinance requiring racial segregation but the Mayor and Superintendent of Police had issued statements such as (p. 270), "We wish to urge the parents of both white and Negro students who participated in today's sit-in

demonstrations to urge upon these young people that such actions are not in the community interest," and (p. 271) "It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department." Pursuant to such exhortations the proprietor had asked the students to leave the counter where they were and to go to the counter at the back of the store where they would be served. Upon their refusal, the arrests and convictions resulted. The Supreme Court reversed under the Fourteenth Amendment.

Similarly, we submit, could defendant not have been prosecuted for trespass, disturbance of the peace, malicious mischief, etc., had he refused to leave. The fact that plaintiff did not resort to self help but turned instead to the courts for vindication of his constitutional rights should, and does not, make any difference. In either event, he is entitled to protection. Cf. concurring opinion of Mr. Justice Goldberg, joined by the Chief Justice and by Mr. Justice Douglas, in Bell v. Maryland, 378 U.S. 226, 286, 293-294, 304, 84 S. Ct. 1814, 12 L. ed. 2d 822, in which it is said (at page 317 of 378 U.S.): "The constitutional right of all Americans to be treated as equal members of the community with respect to public accommodations is a civil right granted by the people in the Constitution -- a right which 'is too important in our free society to be stripped of judicial protection'." See also, Mr. Justice Black dissenting in Bell v. Maryland, 378 U.S. 226, 346, 84 S. Ct. 1814, 12 L. ed. 2d 822, 867.

II

PLAINTIFF'S RIGHTS UNDER THE FOURTEENTH AMENDMENT WERE VIOLATED AND ARE BEING VIOLATED.

The decision by this Court when this case was previously before it (301 F. 2d 639) establishes, we submit, plaintiff's right to judgment. The proof adduced at trial was just as alleged in the complaint. For the sake of completeness, however, we discuss the matter more.

A. Defendants Denied and Are Denying Plaintiff Substantive Due Process.

It has been noted above under Point I that the concept "Get out of here; you can't eat here; go over there where you will be served", is no answer to the claim that the citizen's rights are being denied him when refusal is made at the place he wants and is entitled to be. Such conduct by the State or such conduct by private persons under the aegis of the state denies, in the context of the case at bar, the fundamental right to freedom of movement. It is banishment, albeit not to Siberia nor from a whole state. However the principle is the same and the State has no power to so decree. Who is the State to tell the citizen where he shall eat his dinner?

Summary exile or banishment as a means of the conduct of official public business has a long and infamous history. Relief

against it was one of the concessions won by the "freemen" against King John in the Magna Carta (Article 39). 8/ Today, it is barred by Article 9 of the Universal Declaration of Human Rights. 9/ In Mr. Justice Douglas' book, "An Almanac of Liberty" (Doubleday & Co., N.Y. 1954), he reminds (p. 73) that

> " . . . It was practiced in America during the colonial period. In Russia, exile to Siberia has long been a form of sentence, following conviction for a political or other crime. Other countries of Asia have used banishment as a means of getting rid of 'troublesome' or 'undesirable' people. . . . "

In Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S. Ct. 1138, 92 L. ed. 1478, the Supreme Court struck down the California statute which forbade alien Japanese from getting a commercial fishing license. During the course of its opinion, it referred to Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. ed. 131, and said that that decision stood for the proposition that an alien, lawfully in this country, "had a federal privilege to enter and abide in 'any state in the Union' " (334 U.S. at 415). In the Truax case itself which struck down an Arizona statute requiring Arizona employers to hire a certain percentage of native-born

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8/ "No freeman shall be . . . banished . . . unless by the judgment of his peers, or by the law of the land."

9/ "No one shall be subjected to arbitrary arrest, detention or exile."

persons, the Court said (239 U.S. 33, 42):

> " . . . The assertion of an authority to deny aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode . . . and if such a policy were permissible, the practical result would be that those lawfully admitted to the country . . . , instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality. "

How much more clear, therefore, the invalidity of defendant's conduct in this case where plaintiff is a citizen. 10/

In Edwards v. California, 314 U.S. 160, 62 S.Ct. 164, 86 L.ed. 119, California sought to put a restriction upon those who could come into the State. The Supreme Court said this could not be done. Mr. Justice Jackson's concurring opinion recognized (314 U.S. at 178) that the right to move freely within the United States is an incident of national citizenship protected against interference by the privileges and immunities clause of the Fourteenth Amendment. Mr. Justice Douglas' concurring opinion stated (314

10/ Cf. Mr. Justice Jackson, concurring, in Edwards v. California, 314 U.S. 160, 182, 62 S.Ct. 164, 86 L.ed. 119:

> " . . . The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message: 'Take heed what thou doest: for this man is a Roman' . . . "

U.S. at 181) "that the right of free ingress and egress rises to a higher constitutional dignity than that afforded by state citizenship." See also Crandall v. Nevada, 6 Wall. (U.S.) 35, 18 L.ed. 745; Williams v. Fears, 179 U.S. 270, 274, 21 S.Ct. 128, 45 L.ed. 186:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

See also:

> Chafee, Three Human Rights in the Constitution, 162, 193 (1956).

The effect of defendants' conduct here is, of course, to unwarrantedly and arbitrarily restrict, impede and impair plaintiff's right to move in and about the state. In Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.ed.2d 1204, and Dayton v. Dulles, 357 U.S. 144, 78 S.Ct. 1127, 2 L.ed.2d 1221, the Supreme Court held that the right to travel is a basic right of the citizen, embodied, again, in the basic concept of liberty, protected by the due process clause even in the face of a claim under national security. Thus the court said in Kent (357 U.S. at 125-126):

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the

due process of law of the Fifth Amendment. . . . In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution (1956), 171-181, 187 et seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . . "

This being so, the conduct of the defendants as shown by the evidence in this case is indefensible and plaintiff is entitled to the protection of the Courts.

"The same principle which prohibits the banishment of a criminal from a State or from the United States applies with equal force to a county or city. The old Roman custom of ostracizing a citizen has not been adopted in the United States. The so-called 'floating sentence', so frequently resorted to in some inferior courts, falls in the same category. There is no statute in California authorizing such judgments. "

In re Scarborough, 76 Cal. App. 2d 648, 650,

173 P. 2d 825.

See also:

People v. Blakeman, 170 Cal. App. 2d 596, 597, 339 P. 2d 202;

People v. Lopez, 81 Cal. App. 199, 203, 253 Pac. 169 (Court declared void that part of a sentence ordering deportation of defendant, and noted that Attorney-General "concedes that there is no authority of law by which the State courts can make a valid order of this character.").

If judicial orders of banishment or deportation of convicted criminals are prohibited and there is no authority of law for such actions, a fortiori, there is even less sanction for state officials, acting under color of their authority, from by their own ipse dixit decreeing that certain persons may go here, but they may not go there. And this, even though the standard of state official conduct is that a particular person is "undesirable". Outlawry is no part of the American system.

In American Steel and Wire Co. of N. J. v. Davis, 291 Fed. 800 (ND Ohio 1919), municipal police officers arrested persons from outside the city who came to work at a plant which was on strike. The defendants defended on the ground that this was simply "detaining for investigation" and that if as a result of the investigation no violation of law was found, the persons so "detained" were released. The court did not permit such an argument to prevent

it from protecting a citizen's constitutional right to peacefully come into a city and seek work. Said the Court (291 Fed. at 804):

> "To deny any such person that right because he does not live in Cleveland would be to abridge or deny to such persons privileges and immunities belonging to every citizen of the United States and protected by its Constitution from a denial or abridgment by any state. . . . The power to preserve the public peace and to arrest and prosecute persons for crime cannot be made to support action depriving persons of these constitutional rights and privileges:

See also:

Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.ed. 1423;

Beeler v. Smith, 40 F.Supp. 139 (SD Ky. 1941);

Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E. 2d 241.

The decree in the Hague case, supra, affirmed by the Supreme Court was "addressed to interference with liberty of the person or to the conspiracy to deport, exclude and interfere bodily with the respondents in pursuit of their peaceable activities." (307 U.S. at 517). Plaintiff is entitled to similar protection here.

At 11 Am. Jur., Constitutional Law, §329, p. 1135, it is said:

> "Personal liberty largely consists of the right

of locomotion -- to go where and when one pleases -- only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. The right of a citizen to travel upon the public highways and to transport his property thereon, by horse-drawn carriage, wagon, or automobile, is not a mere privilege which may be permitted or prohibited at will, but a common right which he has under his right to life, liberty, and the pursuit of happiness. Under this constitutional guaranty one may, therefore, under normal conditions, travel at his inclination along the public highways or in public places, and while conducting himself in an orderly and decent manner, neither interfering with nor disturbing another's rights, he will be protected, not only in his person, but in his safe conduct." (emphasis added).

In the Dred Scott case (Scott v. Sandford, 19 How (U.S.) 393, 15 L.ed. 691) which has never been judicially overruled [11/] in explaining why the Negro could not be a citizen, the Court pointed out what the rights of citizenship meant (15 L.ed. at 705):

". . . It would give to persons of the negro race, who were recognized as citizens in any one

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11/ The Civil War and the 13th, 14th and 15th Amendments only attempted to give to the Negro the citizenship rights the Dred Scott case said the white man always had.

State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; . . . " (emphasis added).

In denying, or attempting to deny, to plaintiff these rights, defendants, therefore, violate plaintiff's right to substantive due process of law.

B. The Listing By Defendants of Plaintiff In The Black Book Without a Hearing or Opportunity to be Heard Denies to Plaintiff Procedural Due Process and is a Bill of Attainder.

Such conduct by defendants, designed to and resulting in harm to plaintiff by causing his being refused accommodations and service and being ejected from places though he be not engaging in any improper conduct, in addition to being a denial under the due process clause of the Fourteenth Amendment, is likewise a Bill of Attainder in direct violation of Article I, §10, cl. 1 of the Constitution (No State shall . . . pass any Bill of Attainder . . . ").

This is precisely the kind of publication which is not permitted. While the designation is not a bill of attainder in the

traditional sense because not done by a legislature, it certainly possesses all the vices at which the Constitutional prohibition was aimed. In United States v. Lovett, 328 U.S. 303, 66 S. Ct. 1073, 90 L. ed. 1252, Congress passed a bill prohibiting the future payment of the salary of three named persons on the ground they were "subversives". The Court struck the legislation down, saying (328 U.S. at 315):

> " . . . [L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. . . . "

Defendants have done precisely that here. See also, United States v. Brown, 381 U.S. 43, 85 S. Ct. ___, 14 L. ed. 2d 484, holding unconstitutional as a Bill of Attainder, that provision of the Landrum-Griffin Act (29 U.S. C. 504 [1958 Ed. Supp. IV], 73 Stat. 519, 536) which prevented a member of the Communist Party from holding union office. That decision affirmed the holding of this Court (334 F. 2d 488 [1964]) likewise invalidating the section, but on First and Fifth Amendment grounds.

The fact that the action here was not by members of the legislature, but by members of the executive and administrative branch of the government is of no moment. In Joint Anti-Fascist Refugee v. McGrath, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817, the Attorney General, pursuant to a Presidential Executive Order,

listed and designated, without notice, hearing or opportunity to be heard, certain organizations, membership in which would be evidence to support denial or discharge from government employment. The Supreme Court struck this action down. Mr. Justice Black, concurring, summed the matter up when he said (341 U.S. at 143):

> "Assuming, though I deny, that the Constitution permits the executive officially to determine, list and publicize individuals and groups as traitors and public enemies, I agree with Mr. Justice Frankfurter that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and a fair hearing. . . . "

The right to notice, an opportunity to be heard and a fair hearing is basic. It goes to the very root and basic tradition of the concept of due process of law. It seems almost demeaning to have to remind ourselves of the principle. And yet, of course, constant reminder is necessary because, unfortunately, in fact, the principle is constantly being forgotten or ignored, as here, requiring court action for rectification. In Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.ed.2d 1377, the Supreme Court struck down administrative action which had designated an individual as a "security risk" without his being given the right to confrontation. The Court said (360 U.S. at 496):

> "Certain principles have remained relatively

immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases (citing cases), but also in all types of cases where administrative and regulatory action were under scrutiny. (Citing cases.) Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. Joint Anti-Fascist Committee v. McGrath,

341 U.S. 168 - 169 (concurring opinion)."

In Parker v. Lester, 227 F. 2d 708 (1955), this Court said (p. 716):

> ". . . When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, it has always been held that the constitutional requirement is that he shall be afforded notice and an opportunity to be heard. . . ."

And in Morgan v. United States, 304 U.S. 1, 18, 58 S. Ct. 773, 999, 82 L. ed. 1129, it was said:

> ". . . The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

In Holden v. Hardy, 169 U.S. 366, 389-390, 18 S. Ct. 383,

42 L. ed. 780, the language was:

> " . . . This Court has never attempted to define with precision the words 'due process of law', nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

And in Hovey v. Elliott, 167 U.S. 409, 417, 17 S. Ct. 841, 42 L. ed. 215:

> " . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? . . . "

We will not belabor the point. We believe that defendants' designation of plaintiff as an "undesirable" without notice or opportunity to be heard and a fair hearing falls so far outside the pale of permissible executive [12/] or administrative conduct as to require no

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12/ The fact that one of the defendants is the Governor of the State does not prevent plaintiff from getting relief against him. Such precise relief was given by the federal district court in Sterling v. Constantin, 287 U.S. 378, 53 S. Ct. 190, 77 L. ed. 375, against the Governor of Texas and in recent litigation concerning the New Orleans schools, the Governor of Louisiana was enjoined by the federal district court and this action was upheld by the Supreme Court (Williams v. Davis, 364 U.S. 500, 81 S. Ct. 260, 5 L. ed. 2d 245).

further exposition, save, perhaps to say this: Defendants believe plaintiff is "undesirable". But this, of course, is no justification, nor will the Courts permit it. "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility rests upon this Court, than that of translating into living law and maintaining this constitutional shield (due process of law) deliberately planned and inscribed for the benefit of every human being subject to our Constitution -- of whatever race, creed or persuasion." (Chambers v. Florida, 309 U.S. 227, 241, 60 S. Ct. 472, 84 L. ed. 716; parentheses added).

This judicial duty is constantly being performed. The Court of Appeals for the Second Circuit in the so-called "Apalachin Case", albeit "the persuasive innuendo throughout the case that this was a gathering of bad men for an evil purpose", refused to permit a conviction to stand through the use of "crash methods". (United States v. Bufalino, 285 F. 2d 408, 415, 420 [1960]).

In Gros v. United States, 136 F. 2d 878, 880 (1943), this Court said that law enforcement agents may not act "like the Gestapo". To the same general view is the noteworthy opinion (although dissenting on the merits) of Justice Frankfurter in Davis v. United States, 328 U.S. 582, 597, 66 S. Ct. 1256, 90 L. ed. 1453:

> ". . . It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make

light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end."

See, also,

United States v. Seeger, 303 F. 2d 478, 452 (CA 2 1962);

Bridges v. United States, 184 F. 2d 881, 887 (CA 9 1950).

Fundamental rights have thus been denied plaintiff to his damage.

C. Plaintiff's Rights Under the Fourth Amendment Were Violated.

It is now settled that the Fourth Amendment is applicable to the states through the Fourteenth Amendment (Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. ed. 1782; Irvine v. California, 347 U.S. 128, 74 S. Ct. 381, 98 L. ed. 561; Frank v. Maryland, 359 U.S. 360, 79 S. Ct. 804, 3 L. ed. 2d 877; Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. ed. 2d 1081).

It is likewise settled that when one's Fourth Amendment rights have been violated, he may recover therefor in a suit under the Civil Rights Act (Cohen v. Cahill, 281 F. 2d 879 [CA 9 1960];

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. ed. 2d 492.).

And it is also clear that the right to privacy given by the Fourth Amendment protects against more than actual physical seizure (Wong Sun v. United States, 371 U.S. 471, 485-486, 83 S. Ct. 407, 9 L. ed. 2d 441) and against more than surreptitious spying (York v. Story, 324 F. 2d 450 [CA 9, 1963]; pet. for writ of cert. den. 376 U.S. 939, 84 S. Ct. 794, 11 L. ed. 2d 659). Its protection goes, indeed, to "elementary self-respect and personal dignity". (York v. Story, supra, p. 455). The Fourth Amendment, like all the "specific guarantees in the Bill of Rights (has) penumbras, formed by emanations from (that) guarantee ( ) that help give (it) life and substance." (Griswold v. Connecticut, 381 U.S. 479, 484, 85 S. Ct. ___, 14 L. ed. 2d 510 514). These include the rights of "privacy and repose". (ibid, at 484). Here defendants caused plaintiff to be ejected, and the non-state defendants did eject plaintiff, from a place he had a right to be. Only because plaintiff submitted, was actual physical force not used against him. But the threat of force was there. Cf. United States v. Di Re, 332 U.S. 581, 594, 68 S. Ct. 222, 92 L. ed. 210, 220. This is sufficient to invoke Fourth Amendment protection. See, Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. ed. 746, holding that the delivery of a piece of paper, a subpoena duces tecum, was sufficient a seizure, even though the subpoenee himself was to bring the documents, to fall within Fourth Amendment protection. The significance of Boyd in the context here being urged is the better understood from the language of the concurring opinion (29 L. ed. at 755):

"I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute."

D. Plaintiff Has Been and Is Being Denied Equal Protection of the Law.

Working in this delicate field of individual human rights, defendants, instead of employing sharp instruments carefully pointed to meet the desired end (Cf. Speiser v. Randall, 357 U.S. 513, 525, 78 S. Ct. 1332, 2 L. ed. 2d 1460, 1472) have painted with too broad a brush and have shown no overriding compelling need therefor. (Bates v. Little Rock, 361 U.S. 516, 524, 80 S. Ct. 412, 4 L. ed. 2d 480; Gibson v. Florida Investigating Committee, 372 U.S. 539, 546, 83 S. Ct. 889, 9 L. ed. 2d 949.)

In a sense, the thought just expressed is a concept of substantive due process. It points up the arbitrary, capricious and unreasonable nature of defendants' "exclusion from the premises" position. However, the idea is urged in this section of our brief for it likewise demonstrates the arbitrariness and unreasonableness of defendants' attempted classification. In addition to the Speiser and other cases cited above, the principle is exemplified by this statement repeated by the Supreme Court in Griswold v.

Connecticut, 381 U.S. 479, 485, 85 S. Ct. ___, 14 L. ed. 2d 510: "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' "

It is also pointed up in the Supreme Court's decision in Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. ed. 2d 992. In that case, the Court was considering the validity of §6 of the Subversive Activities Control Act (50 U.S.C. 785) which forbade a member of the Communist Party from traveling abroad. This, for the entirely proper purpose of protecting our national security. The Court pointed out that the section applied (378 U.S. at 511) "regardless of the purpose for which an individual wishes to travel" and (at p. 512) "regardless of the security-sensitivity of the areas in which he wishes to travel." Accordingly, the statute is unconstitutional, the Court saying (at page 514):

> " . . . The section, judged by its plain import and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. . . . The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil.' . . . Yet here,

as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, . . . "

The case at bar is even stronger from the standpoint of plaintiff. In Aptheker, the evil (prevention of Communists from engaging in subversive activity abroad) is at least clear. The substantive evil against which defendants seek to protect is not here so clear. Presumably, it is the possible bad public image of the gambling industry (RT 33). Yet if protection against a bad public name is the evil, defendants have used anything but precise instruments to effect it. Preventing a man from obtaining hotel or sleeping accommodations is hardly directed to that end.

Defendants make the same constitutional mistake the States of Oregon and California did as exemplified in the cases of De Jonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. ed. 278; Danskin v. San Diego Unified School District, 28 Cal. 2d 536, 171 P. 2d 885 and American Civil Liberties Union v. Board of Education, 55 Cal. 2d 167, 359 P. 2d 45. Namely, attempting to prevent a person from engaging in lawful conduct in one place because he engaged, or it is alleged he engaged, in unlawful conduct elsewhere. In De Jonge, the statute forbade an organization which advocated criminal syndicalism from holding a meeting. Ruling the statute to be unconstitutional as applied, the Court, speaking through Mr. Chief Justice Hughes, said (p. 365):

" . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged

in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

"We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. . . . "

In Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P. 2d 449, the rules governing the operation of race tracks required the stewards to exclude, or eject if they succeeded in gaining admission, persons guilty of dishonest or corrupt practices, fraudulent acts or other conduct detrimental to racing, and also, inter alia, "undesirables", 13/ touts and persons of lewd or immoral character. Holding that plaintiff was entitled to an injunction against his being refused admission to the track, the Court held, among other things, that evidence of plaintiff's past conviction of offenses pertaining to gambling and bookmaking

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13/ Cf. RT 459 where the same word is used by defendants.

should have been excluded as irrelevant. Turning next to the heart of the case, the Court said (p. 741):

> "It may be assumed that the plaintiff might be suspected of illegal gambling activities off the race-course. The defendant would be justified in taking reasonable precautions to prevent opportunities for the commission of criminal activities on the course. Here, however, there is no evidence whatsoever, and it is not suggested, that the plaintiff while on the course was or ever had engaged in illegal activities or in an attempt to commit a crime. . . . "

Speaking to the argument that the rules required such persons as plaintiff to be excluded, the Court said (pp. 737 and 740):

> "There is here no quarrel with these rules insofar as they relate to the regulation of the licensee and its employees in the conduct of the races and of wagering on the results thereof. However, insofar as they govern the licensee in exercising the power of exclusion of persons from participation in the public entertainment afforded, they may not be deemed to narrow the established right of participation by all persons on an equal basis. . . .
>
> " . . .
>
> " . . . Cases involving the method of ascertaining the good moral character required of an applicant for a privilege, such as the license to

operate the racecourse, are inapplicable."

In Wakat v. Harlib, 253 F. 2d 59, 65 (CA 7 1958), the Court said:

"... Obviously where there is a record of a man's previous criminal conviction, to the police he is a well-known criminal. ...

"It is clear that the treatment which Harlib and the other defendants gave to plaintiff was different from the treatment which he would have received if he had not had a record of conviction for crime. We are unaware of any recognized distinction between persons having such a record and persons not having such a record, within the orbit of civil rights under § 1985. However, without any authority, plaintiff was so classified by defendants and, in consequence thereof, was deprived of the protection of the federal constitution and laws available to persons in the classification of those not convicted of crime."

In Patterson v. State, 9 Okla. Cr. 564, 569, 132 Pac. 693, 695 (1913), the defendant was charged with keeping a bawdy house. The evidence was that prostitutes had taken a room and slept there on the night in question. Said the Court:

"... Even though the proprietor had knowledge of their reputation and character, however low such

women have fallen, and however great an evil the existence of such a class in the community might be considered, still they are human beings and entitled to shelter, and there is no law which makes it a crime to give them shelter. The law only forbids the giving of shelter or lodging to such persons for immoral purposes. For this reason the facts in our opinion do not warrant a conviction, and as a matter of law the verdict is contrary to the evidence."

In Matter of Farley, 217 N.Y. 105, 111 N.E. 479 the proceeding was to revoke a liquor license on the ground the licensee was operating a disorderly house. In reversing the revocation, then, Judge Cardozo tersely said (217 N.Y. at 110):

"... We have, therefore, looked into the record to discover whether there is such evidence, and we cannot find it. The most that is shown is that some woman of loose character dined or supped in the appellant's restaurant. That is not enough."

In Stoumen v. Reilly, 37 Cal. 2d 713, 234 P. 2d 969, a liquor license was suspended on the ground that homosexuals used the bar as a meeting place. In reversing this holding, the Court said:

P. 716: "... Members of the public of lawful age have the right to patronize a public restaurant and

bar so long as they are acting properly and are not committing illegal or immoral acts; . . . "

P. 715: " . . . There is no evidence of any illegal or immoral conduct on the premises or that the patrons resorted to the restaurant for purposes injurious to public morals."

P. 716: "The fact that the Black Cat was reputed to be a 'hangout' for homosexuals indicates merely that it was a meeting place for such persons. (See Webster's New Internat. Dict.) Unlike evidence that an establishment is reputed to be a house of prostitution, which means a place where prostitution is practiced and thus necessarily implies the doing of illegal or immoral acts on the premises, testimony that a restaurant and bar is reputed to be a meeting place for a certain class of persons contains no such implication. Even habitual or regular meetings may be for purely social and harmless purposes, such as the consumption of food and drink, and it is to be presumed that a person is innocent of crime or wrong and that the law has been obeyed. . . . "

In Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d 313, 347 P. 2d 909, a California statute which authorized the revocation of a license without requiring anything more to be

shown than that the premises are a resort for certain classes of people was held to be unconstitutional.

Accordingly, classification of persons because of reported bad past conduct and not because of any danger of bad conduct on the premises and exclusion and eviction of such person for no other reason, is an invalid classification and must fall. Defendants cannot get around the constitutional prohibition by the argument that plaintiff is being accorded the same treatment as the others in the "class" -- the eleven men listed in the Black Book. This is a beguiling, but fallacious, argument. The classification itself must be valid. (Power Manufacturing Co. v. Saunders, 274 U.S. 490, 493, 47 S.Ct. 678, 71 L.ed. 1165). Here it is not.

The testimony of defendant Hotchkiss (RT 483) that "there is a matter of discretion involved," speaks eloquently of the arbitrariness of defendants' conduct.

III

THE FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY THE RECORD IN THIS CASE.

Actually, we believe this point has been covered in the arguments advanced above under Point I. We say a brief word, however.

If appellant is right, as he believes he is, in his contention that he has been denied his constitutional rights by defendants, then the finding of the trial court (CT 187) that plaintiff suffered

no pecuniary damage thereby is unsupportable. The Civil Rights Act itself (42 U.S.C. 1983) provides that damages shall be paid for such deprivation, and damages are traditionally recoverable when one is improperly excluded from a place of public accommodation. Mateer v. Brown, 1 Cal. 221, 230, 52 Am.Dec. 303; Bowlin v. Lyon, 67 Iowa 536, 538-539, 25 N.W. 766; Kisten v. Hildebrand, 48 Ky. (9 B.Mon.) 72, 74, 48 Am.Dec. 416; Atwater v. Sawyer, 76 Me. 539; Markham v. Brown, 8 N.H. 523, 528, 31 Am.Dec. 209; De Wolf v. Ford, 193 N.Y. 397, 401, 86 N.E. 527; Grinnell v. Cook, 3 Hill (N.Y.) 485, 488, 38 Am.Dec. 663; Bennet v. Mellor (1793), 5 T.R. 273, 276, 101 Eng.Rep. 154, 155; Robins & Co. v. Gray (1895), 2 Q.B. 501, 504, 507, 508. Cf. Coger v. North West. Union Packet Co., 37 Iowa 145, discussed in Mr. Justice Goldberg's concurring opinion in Bell v. Maryland, 378 U.S. 226, 295, 84 S.Ct. 1814, 12 L.ed.2d 822, wherein the plaintiff was awarded damages for assault and battery because she, a colored woman, was ordered from the main dining room of a boat.

Moreover, appellant is entitled to injunctive relief under the Civil Rights Act to prevent appellees from continuing in their course of conduct. (Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.ed. 1423).

Similarly, the findings (CT 188) to the effect that the appellees acted reasonably in excluding appellant from the entire premises and that such was necessary in order to achieve effective enforcement of the Nevada Gaming Control Act and the regulations of the appellee Commission and Board, are simply not supported

by the evidence. Appellees have made no showing of what the evil is that has or would result from the law abiding presence of appellant on the non-gaming portion of the premises. It is clear that appellees do not want appellant around, but that is hardly sufficient. If it is injury to the gambling industry that appellees have in mind, they have made no showing of such injury. Moreover, appellees have completely failed to show, as they must when they seek to curtail personal freedom, 14/ that no means, other than the broad and drastic method they have pursued, will combat the evil they allege to exist even had the proof shown, which it does not, that the evil actually exists.

Accordingly, appellees have failed to establish the indispensable base the Constitution requires in order for a citizen to be deprived of his freedom.

14/ " '[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' . . . '[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' " (Aptheker v. Secretary of State, 378 U.S. 500, 508, 84 S. Ct. 1659, 12 L. ed. 2d 992, 999). It is "plainly . . . incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses. . . . " (Sherbert v. Verner, 374 U.S. 398, 407, 83 S. Ct. 1790, 10 L. ed. 2d 965, 972).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

WILLIAM B. BEIRNE

A. L. WIRIN

FRED OKRAND

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

/s/ Fred Okrand

FRED OKRAND

APPENDIX A

TABLE OF EXHIBITS

Plaintiff's Exhibits

Exhibit No.	Identified	Received	Rejected
1	32	34	
2	38, 40	113	
3	42	42	
4	95	95	
5	344	345	
6a	345	345	
6b	346	345	
6c	346	345	
6d	346	345	
6e	346	345	
6f	346	345	
6g	346	345	
6h	346	345	
7a	346	349	
7b	348	349	
7c	348	349	
7d	348	349	
7e	348	349	
7f	349	349	
7g	349	349	

Exhibit No.	Identified	Received	Rejected
7h	349	349	
7i	349	349	
8	349	350	
9	445		446

State Defendants' Exhibits

A1	255	507, 526	
A2	255	260, 503, 526	
A3	255	507, 526	
A4	255	507, 526	
A5	255	261, 503, 526	
A6	255	507, 526	
A7	255	262, 263, 503, 526	
A8	255	263, 503, 526	
A9	255	507, 526	
A10	255	507, 526	
A11	255	264, 503, 526	
A12	255	507, 526	
A13	255	507, 526	
A14	255	507, 526	
A15	255	507, 526	
A16	255	264, 503, 526	
A17	255		505
A18	255		505
A19	255	507, 526	

Exhibit No.	Identified	Received	Rejected
A20	255	507, 526	
A21	255	507, 526	
A22	255	266, 502, 503, 526	
A23	255	507, 526	
A24	255	266, 502, 503, 526	
A25	255	507, 526	
A26	255	507, 526	
A27	255	507, 526	
A28	255	507, 526	
A29	255	507, 526	
A30	255	507, 526	
B	420	420	
C	420	420	
D	425	425	
E	425	425	
F	427	427	
G	487	490	
H	487	490	
I	487	492	
J	493	495	
K	493	497	
L	512	524, 526	
M	529	529	
N	529	529	

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

JOHN MARSHALL, Plaintiff, vs. GRANT SAWYER, as Governor of the State of Nevada; NEVADA GAMING CONTROL BOARD, RAY J. ABBATICCHIO, JR., as Chairman, GEORGE ULLOM, and NED A. TURNER, as Members, of the NEVADA GAMING CONTROL BOARD, NEVADA GAMING COMMISSION, MILTON W. KEEFER, as Chairman, NORMAN D. BROWN, BERT GOLDWATER, JAMES W. HOTCHKISS and F. E. WALTERS, as Members of the NEVADA GAMING COMMISSION: D. I. OPERATING CO., a Nevada Corporation; ALLEN ROEN, RUBY COLOD, DON BORAX, ARTHUR OSTAP, J. G. MURRAY, Defendants.	)	Civil No. 360

COMPLAINT FOR INJUNCTION AND DAMAGES

Plaintiff alleges:

I

Plaintiff, John Marshall, is a citizen of the United States and a resident and citizen of the State of Illinois.

Defendant Grant Sawyer, is a citizen and resident of the State of Nevada. He is Governor of the State of Nevada and is charged with the duty of seeing that the laws of that state are

faithfully executed, including the provisions of the Nevada Gaming Control Act (NRS A 1959, 427) and the regulations promulgated pursuant thereto.

Defendants Nevada Gaming Control Board and Nevada Gaming Commission, are the public administrative agencies of the State of Nevada charged with administering the provisions of the said Nevada Gaming Control Act with respect to state gaming licenses.

Defendant Ray J. Abbaticchio, Jr. is the Chairman, and defendants George Ullom and Ned A. Turner are the Members of the Nevada Gaming Control Board. They are citizens and residents of the State of Nevada.

Defendant Milton W. Keefer is the Chairman and defendants Norman D. Brown, Bert Goldwater, James W. Hotchkiss and F. E. Walters are the Members of the Nevada Gaming Commission. They are citizens and residents of the State of Nevada.

Defendant D. I. Operating Co., hereinafter referred to as the Desert Inn or the Desert Inn Hotel is a Nevada corporation, doing business as, and operating, the Desert Inn Hotel in Las Vegas, Nevada and licensed by defendants Board and Commission under the said Nevada Gaming Control Act.

Defendants Allen Roen, Ruby Colod, Don Borax, Arthur Ostap and J. G. Murray are citizens and residents of the State of Nevada. They are employees and agents of defendant Desert Inn and at all times herein mentioned acted as, and within the scope of their employment as such.

III

This Court has jurisdiction under 28 USC 1343(1), (3) and (4) and under 42 USC 1983 and 1985 (3).

This is a civil action arising under the Federal Civil Rights Act, 28 USC 1343 of which, provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

". . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, . . ."

IV

At a time and place unknown to plaintiff, but well known to defendants Sawyer, Board and the members thereof

and Commission and the members thereof, said defendants entered into an agreement and adopted a policy to discriminate against and to bar plaintiff from the State of Nevada as a person designated by them as "undesirable".

In entering into said agreement and adopting said policy, the defendants Sawyer, Board and Commission and the members thereof intended that plaintiff be barred from registering at a hotel, from obtaining service in the dining room or coffee shop of a hotel, from sitting in the lounge or foyer of a hotel, from being in the casino or on the premises of a hotel at any time, for any occasion and under any circumstances.

Said agreement and policy included the compilation, publication and distribution by defendants Board and Commission and the members thereof, of an 8" x 10" booklet bound in black, commonly designated as the "Black Book", containing the names and pictures, including among them, plaintiffs, of persons designated as, and deemed "undesirable" by said defendants. All of this was done without notice or hearing to the persons so designated, including plaintiff.

To enforce said agreement and policy, the agreement and policy also included coercion, intimidation and inducement by said defendants, by threat of loss of license, upon the hotels of the State of Nevada to prevent the presence of plaintiff in the hotels.

V

Pursuant to said agreement and policy, and to effectuate the same:

1. Defendant Swayer, on or about November 2, 1960, publicly states:

"I agree with any measures necessary to keep the hoodlums out of Nevada. The operators have a great responsibility to cooperate.

"We might as well serve notice on underworld characters right now they are not welcome in Nevada and we aren't going to have them here."

In making said statement, defendant Sawyer knew what had happened to plaintiff, as described below in subparagraph 5 hereof, and it was in connection therewith and in the context thereof that said defendant was speaking.

2. The defendants Board and Commission and the members thereof, at a time unknown to plaintiff but well known to said defendants, promulgated and issued, without notice or hearing to the persons designated therein, including plaintiff, the "Black Book" referred to in Paragraph IV above;

3. On or about March 29, 1960 said defendants Board and Commission and the members thereof, distributed said Black Book to hotel operators in the State of Nevada accompanied by a letter, over the signature of defendant Abbaticchio, which reads in whole or in part, so plaintiff is informed and believes, and therefore alleges;

"The attached booklet which will be revised and expanded periodically, contains descriptive data with photographs concerning 11 persons (here

they are listed, including plaintiff).

"In order to avoid the possibility of license revocation for 'unsuitable manner of operation' your immediate cooperation is requested in preventing the presence in any licensed establishment of all 'persons of notorious or unsavory reputation' including the above individuals as well as those who subsequently may be added to this list."

4. Defendants Board and Commission and the members thereof, personally or through their representatives, so plaintiff is informed and believes and therefore alleges, orally informed the recipients of said booklet and letter that unless said recipients acceded to the "request" of said defendants as contained in said letter they, the recipients, would lose their licenses.

5. Defendants took the following action against plaintiff:

On the evening of Friday, October 28, 1960, plaintiff was sitting in the lounge of the defendant, Desert Inn Hotel. He was not committing and had not committed any public offense. Solely because of inducement and/or "request" by representatives of the Defendant Board and Commission and the members thereof, led personally by defendant Abbaticchio who was present with the other representatives and to effectuate the aforementioned agreement and policy, defendants Roen, Colod, Borax, Ostap and Murray ousted plaintiff, under threat of physical force, from the hotel premises. A large number of persons was in the hotel and observed the ousting.

6. In order to harass and intimidate the hotel operators into ousting plaintiff from the hotels, representatives of the defendant Board and Commission and the members thereof, led personally by defendant Abbaticchio, on said evening of October 28, 1960 and others, confiscated cards and dice in the casinos of various hotels in Las Vegas, including those of the defendant Desert Inn, while games were in progress and in full view of public patrons. Such conduct is extremely detrimental to the gambling business of said hotels because, in the eyes of the public, such confiscation of dice and cards while games are in progress implies dishonesty on the part of the hotel operators; said defendants knew that such an impression would be, and they intended that it be given.

7. Defendant Abbaticchio, on or about October 29, 1960, publicly states:

> "There has been some failure of certain Strip operators to abide by an agreement with the control board not to entertain or provide or furnish facilities or cater to those people we consider undesirable and detrimental to the gaming industry because of their association with the underworld.
>
> ". . .
>
> ". . . We are attempting to get them (the reneging Strip operators) to cooperate with the control board."

In making said statement, defendant Abbaticchio knew what had happened to plaintiff, as described above in subparagraph 5

hereof, and it was in connection therewith and in the context thereof that said defendant was speaking.

VI

Plaintiff is informed and believes and therefore alleges that the basis for the designation of plaintiff as an "undesirable" by defendants Sawyer, Board and Commission and the members thereof is the claimed "criminal record" of plaintiff, In point of fact the record of convictions of the plaintiff, aside from traffic tickets, is as follows:

1. In 1929, in Chicago, Illinois, at the age of 18 years, plaintiff was placed on probation for one years for larceny of an automobile;

2. In 1931, in Chicago, Illinois, at the age of 20 years, plaintiff was convicted of petty larceny. His sentence was six months in the House of Correction and $1.00, which sentence plaintiff served and paid;

3. In 1932, in Milwaukee, Wisconsin, at the age of 21, plaintiff was convicted of advising the commission of a felony. He was sentenced to one to three years in the House of Correction. Plaintiff served 19 months of this sentence and was then paroled for the balance thereof; he fulfilled all the terms of his parole.

4. In 1933, in Berwyn, Illinois, at the age of 22, plaintiff was fined $1.00 for disorderly conduct.

5. In 1939, plaintiff was fined $50.00, $100.00 and $15.00 respectively, in one proceeding, for misdemeanors, the exact nature of which plaintiff does not now remember.

6. In 1955, in Beverly Hills, California, plaintiff was arrested on a week-end and charged with failing to register as an exconvict under the Beverly Hills ex-convict registration ordinance. Plaintiff did not know that there was such an ordinance in Beverly Hills nor that he was required to register under it. On being told by the Chief of Police of Beverly Hills that the fine would undoubtedly be $50.00 if plaintiff appeared in court and that he could forfeit the bail, which had also been set at $50.00, and be free, plaintiff posted the $50.00 bail and forfeited it.

In 1960, the Supreme Court of the State of California, in the cases of Abbott v. City of Los Angeles, 53 Cal. 2d 674, and Lambert v. Municipal Court of Los Angeles County, 53 Cal. 2d 690 declared such an ordinance, as the Beverly Hills ordinance above referred to, to be unconstitutional.

VII

Plaintiff's name at birth was Marshal Caifano. In 1955, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, in proceeding number 70653, plaintiff's name was legally changed to John Michael Marshall, which has been his name ever since.

VIII

During the years 1953-1956, plaintiff was a citizen of the State of Nevada and a resident of Las Vegas.

Plaintiff owned some real property in Las Vegas which he sold in 1954. The payments on the note, which was given for payment and which is secured by a mortgage, have not been met and

the matter is now in litigation in the Eighth Judicial District in Las Vegas, Nevada. It is necessary for plaintiff to come to the State of Nevada and to Las Vegas in connection with this litigation, including consultation with counsel; and in order to negotiate for the sale of his interest in the property or to develop it.

Plaintiff cannot stay at a hotel in the State of Nevada for the reason that if he does, defendants Sawyer, Board and Commission and the members thereof, pursuant to the agreement and policy above set forth will induce the operators of the hotel to oust plaintiff from the premises in the same manner as described above in Paragraph v, 5.

IX

By reason of the public ousting of the plaintiff by defendants as above set forth, plaintiff was damaged, suffered humiliation, embarrassment, loss of the right to public accomodation and to freedom of movement. In addition to which, the incident was widely publicized in the public press in Las Vegas causing him further damage, humiliation, embarrassment and loss of said rights. Said publications are referred to herewith, incorporated herein as though fully set forth, and a copy of one thereof attached hereto as Exhibit "A".

WHEREFORE, plaintiff prays:

1. As to the defendant officials of the State of Nevada:

(a) For damages in the amount of $100.00 against each of the defendants Sawyer, Board, Commission, Abbaticchio, Ullom,

Turner, Keefer, Brown, Goldwater, Hotchkiss and Walters;

(b) For an injunction restraining and enjoining defendants Sawyer, Board and Commission and the members thereof, their agents, employees or any one acting in concert with them or on their behalf, from giving effect to said policy and action of keeping plaintiff out of the State of, and hotels in, Nevada through said Black Book or said letter of March 29, 1960, and from causing, coercing or inducing the operators or employees of hotels in Nevada, by threat of cancellation of license or otherwise, to bar or eject plaintiff from their premises, or to refuse to give service or afford accomodations to plaintiff on the same basis as any other citizen;

2. For damages against the defendants Desert Inn, Allen Roen, Ruby Colod, Don Borax, Arthur Ostap and J. D. Murray in the sum of $150,000.00;

3. For costs of suit incurred herein;

4. For such other and further relief as to the Court shall seem just and proper.

W. ALBERT STEWART, JR.

W. B. BEIRNE

A. L. WIRIN

FRED OKRAND

of counsel Attorneys for Plaintiff

FILED

DEC 22 1960

OLIVER F. PRATT, Clerk

By Ray Mana Smith, Deputy

APPENDIX C

TITLE OF COURT AND CAUSE

ANSWER

The Defendants D. I. OPERATING CO., a Nevada Corporation ALLARD ROEN, named in Plaintiff's Complaint as "ALLEN ROEN", RUBY KOLOD, named in Plaintiff's Complaint as "Ruby Colod", DON BORAX, ARTHUR OSTAP and J. G. MURRAY, answering the Complaint allege:

I.

Allege that they have no knowledge or information sufficient to form a belief as to the truth of Paragraphs 1, lll, iv and subparagraphs 1, 2, 4 and 7 of Paragraph V, VI, VII, VIII and IX, except the Defendant D. I. OPERATING CO. admits that it received the so-called "Black Book" described in said paragraph IV; further with reference to subparagraph 2 of said Paragraph V, the defendant D. I. OPERATING CO. admits that it received a copy of the so-called "Black Book".

II.

Admit the allegations of Paragraph II thereof; however, said Defendants allege that the true name of "Allen Roen" is ALLARD ROEN and the true name of "Ruby Colod" is RUBY KOLOD.

III.

Answering subparagraph 5 of Paragraph V, defendants

admit the allegations thereof, save and except they deny that Plaintiff was ousted from the hotel premises under threat of physical force or by means of physical force.

IV.

Answering subparagraph 6 of paragraph V, defendants admit that on or about October 28, 1960, the defendant Ray J. Abbaticchio and others confiscated cards and dice in the casino of Wilbur Clark's Desert Inn while games were in progress and in full view of public patrons; Defendants also admit that this action is extremely detrimental to the gambling business of hotels. Other than that which is herein admitted, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations of said subparagraph.

WHEREFORE, defendants pray that plaintiff's Complaint be dismissed as against these defendants, for their costs of suit, and for such other and further relief as the Court shall deem just and proper.

Dated this 30th day of January, 1961.

Affidavit of service

FILED

JAN 30 1961

OLIVER F. PRATT, Clerk

by ROSE KIZER, Deputy

MORSE AND GRAVES and

J. A. DONNELLEY

By MADISON B. GRAVES

affidavit